jurisdiction to review remand orders pursuant to SLUSA. (*See* Pet. at 12.) Accordingly, these circuits are unlikely to have an opportunity to revisit or refine their holdings concerning SLUSA preemption. Because several courts of appeals, including the Second Circuit below, already have decided the question presented in a manner that conflicts with the Seventh Circuit's and the SEC's views, the issue is sharply presented for review now.

3. The Second Circuit's Interpretation of SLUSA's "In Connection With" Requirement in the Decision Below Is Contrary To SLUSA's Language and Intent

The decision below directly contravenes the plain language of SLUSA and frustrates its purpose. Congress enacted SLUSA to establish uniform national standards of liability for conduct alleged to affect national securities markets and to eliminate fragmentary investor remedies. (*See* Pet. at 11.) The broad, preemptive reach of SLUSA reflects Congress's judgment that because of their great potential for abuse, private securities class actions (as opposed to individual actions or public enforcement actions) must proceed in federal court under "federal securities law or not at all." *Kircher*, 403 F.3d at 484; *see Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003).

SLUSA preempts more than simply those claims that could have been brought as private federal actions under section 10(b). (*Cf.* Resp. Br. at 12-15; Pet. App. at 21a.) Respondent does *not* refute petitioner's "plain statutory language" argument that the *Blue Chip Stamps* purchaser-seller standing requirement is not a construction of the "in connection with" language of section 10(b). Rather, it is a limitation on standing imposed by the Court on a subset of enforcement mechanisms under section 10(b), namely, private rights of action for damages under section 10(b). (*See* Pet. at 13-15.) As Judge Easterbrook noted, section 10(b) still applies to prohibit conduct in actions where the plaintiff is not a purchaser or seller, namely, in actions brought by public enforcement authorities. *See Kircher*, 403 F.3d at 483 (citing *SEC v. Zandford*, 535 U.S. 813, 821-22 (2002); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971)).

Because the purchaser-seller requirement is a judicially crafted *standing* limit only on private federal securities actions rather than a limit on the full statutory scope of section 10(b), it cannot limit the preemptive scope or effect of SLUSA, which uses the identical "in connection with" statutory language as does section 10(b). Indeed, as Judge Easterbrook observed:

> By depicting their classes as containing entirely non-traders, plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead they demonstrate only that the claims must be left to public enforcement. It would be more than a little strange if the Supreme Court's decision to block private litigation by non-traders became the opening by which that very litigation could be pursued under state law, despite the judgment of Congress (reflected in SLUSA) that securities class actions must proceed under federal securities law or not at all. *Blue Chip Stamps* combined with SLUSA may mean that claims of the sort plaintiffs want to pursue must be litigated as derivative actions or committed to public prosecutors, but this is not a good reason to undercut the statutory language.

Kircher, 403 F.3d at 484.

Rather than refute this plain statutory language argument, respondent relies entirely upon isolated excerpts from the legislative history of SLUSA to argue that Congress intended to import the judicially created purchaser-seller requirement of standing in the federal context into SLUSA's definition of preempted state law claims. Respondent's attempted resort to legislative history cannot, however, contradict a statute that on its face plainly contains no such limiting language. *See, e.g.*, *Spielman*, 332 F.3d at 124 ("[W]e cannot ignore Congress' clear intent that SLUSA completely preempt certain types of class action securities lawsuits.").

Finally, a rule of decision, like the Court's below, which judicially restricts the broad preemptive scope of SLUSA is not necessary to ensure that alleged wrongdoers will remain subject to vigorous statutory enforcement. As the facts of this

very case demonstrate, federal and state regulators remain able and willing to pursue effective enforcement actions on behalf of the public. Plaintiffs may also bring the same actions *individually* under state law theories, or as class actions under the federal securities laws. It is only state law private class actions - which Congress determined, as a matter of its legislative judgment, are disproportionately prone to abuse - that SLUSA preempts and requires to be brought under federal law and in a federal forum, or not brought at all.

As the SEC explains in its brief filed in *Dabit* (Pet. App. 72a-100a), "the phrase 'in connection with the purchase or sale' of securities, as used in SLUSA, has the same broad meaning as in Section 10(b) of the Exchange Act." (Pet. App. 80a.) "Adopting for SLUSA purposes a construction of the term that is more restrictive than the definition applied under Section 10(b) would mean that litigants could continue to bring some cases under state law rather than being forced to sue under Section 10(b) and its attendant constraints." (Pet. App. 81a.) The Second Circuit's decision below to the contrary not only contravenes the SEC's urged interpretation of SLUSA's language and purpose, but also conflicts with the reasoned opinion of the Seventh Circuit in *Kircher*.

This Court should grant the petition to review, in plenary fashion, the merits of the question presented in light of the direct split among the courts of appeals - a split which, both by its existence and in its substance, impedes Congress's consistently stated objective to ensure uniform national standards for securities litigation involving nationally traded securities. (*See* Pet. at 16-17.)

CONCLUSION

For all of the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 19, 2005

Respectfully submitted,

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No. 04-1371

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

SHADI DABIT, on behalf of himself and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER IN FURTHER SUPPORT OF THE PETITION FOR CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

On April 11, 2005, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") petitioned this Court for certiorari review in this matter, in light of the square conflict between the Second Circuit's decision below and the Seventh Circuit's decision in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005) (Easterbrook, J.), *rehearing denied*, No. 04-1495, 2005 U.S. App. LEXIS 7914 (7th Cir. May 2, 2005). Pursuant to Rule 15(8) of the Rules of this Court, petitioner hereby files this supplemental brief to bring to the Court's attention two subsequent, recent developments relevant to its consideration of the Petition.

First, the individual class plaintiffs in *Kircher* have informed the Court that they intend to file a petition for certiorari seeking review of the Seventh Circuit's decision. *See Kircher v. Putnam Funds Trust*, No. 05A73. As a result of two extensions of time, the *Kircher* petition is now due September 29. In their applications for extensions of time, the *Kircher* petitioners cited the circuit split on the question presented as warranting review by this Court. *See* No. 05A73, Application for Second Extension of Time Within Which to File Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit (Aug. 19, 2005), at 3; Application for Extension of Time Within Which to File Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit (July 20, 2005), at 2.

Second, the Seventh Circuit very recently issued another decision in conflict with the decision below. It held, relying on *Kircher*, that putative class claims should have been dismissed as preempted by SLUSA where they asserted that allegedly false and misleading investment recommendations induced putative class members to "continue holding" any of several "Internet or Telecom Stocks." *Disher v. Citigroup*

Global Markets Inc., No. 04-3073, 2005 U.S. App. LEXIS 17334, at *2-4, *14-17 (7th Cir. Aug. 17, 2005). The *Disher* court noted that while the Second Circuit's decision below supported plaintiffs' position that SLUSA incorporated a purchaser-seller requirement, the Seventh Circuit had "concluded that SLUSA's 'in connection with the purchase or sale of a covered security' requirement does not incorporate the *Blue Chip Stamps* standing rule." *Id.* at *15 (citing *Kircher*, 403 F.3d at 483-84). The *Disher* court also noted that "[t]he Supreme Court has not yet had occasion to consider this phrase ['in connection with the purchase or sale of a covered security'] in the context of SLUSA." *Id.* at *13. The *Disher* court also confirmed, contrary to the argument in respondent's opposition, that the SLUSA holding of the Seventh Circuit in *Kircher* was not mere dictum but rather was essential to the court of appeals' disposition of the complaints at issue in that case: "In *Kircher*[], one of the plaintiffs' classes was defined as all investors who held the defendant mutual fund's securities during a defined period and did not purchase or sell shares during that period." *Disher*, 2005 U.S. App. LEXIS 17334, at *15 (citing *Kircher*, 403 F.3d at 483). *Disher*, therefore, further supports Merrill Lynch's position that review by this Court is warranted because of the square conflict among the circuits on an important issue of federal statutory law. (*See* Pet. at 11-21.)

As noted, plaintiffs in *Kircher* will be filing their petition by September 29, 2005, after which a response may be filed or requested. In light of the importance of an expeditious resolution of the question presented to the federal securities markets, as well as the time which already has elapsed since the decision below was rendered in January 2005 and the Petition filed in April 2005, petitioner respectfully urges that the Petition be granted or that the views of the Solicitor General be requested at this time.

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